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[APPELLATE CIVIL JURISDICTION]

McELWAINE, C.J., MILLS & PEDLOW, JJ.

September 27, 1938.

RE E. E. MANASSEH.

EX PARTE W. MILLER MACKAY.

[SINGAPORE CIVIL APPEAL No. 4 of 1938]

Bankruptcy Ordinance (Cap. 45), s. 95—Power to stay proceedings pending appeal.

The plaintiff brought an unsuccessful action against the defendant which action was dismissed with costs, such costs being taxed at $6,742.95. The judgment creditor issued execution for the costs and subsequently filed a bankruptcy petition against the judgment debtor. On the hearing of the bankruptcy petition the judgment debtor applied for a stay pending the hearing of an appeal which he had lodged against the judgment of the Court in the unsuccessful claim. In the Court of first instance the Judge held that he had no discretion to grant a stay and accordingly he made receiving and adjudication orders against the judgment debtor. The judgment debtor thereupon appealed against the refusal of the Judge to stay the bankruptcy proceedings.

Held, by the Court of Appeal that s. 95 of the Bankruptcy Ordinance gives the Judge power to stay bankruptcy proceedings subject to such terms and conditions as he thinks just. The Court of Appeal then proceeded to exercise the discretion which the Judge sitting in bankruptcy might have exercised and they made an order setting aside the receiving order and the adjudication order on the terms that security should be deposited in Court for the approximate costs of the Appeal.

APPEAL.

Ross (*Johannes* with him) for appellant.

O'Connor (*Burke* with him) for respondent.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

The judgment of the Court of Appeal (**McELWAINE, C.J., MILLS** and **PEDLOW, JJ.**) was delivered by—

McELWAINE, C.J.—Manasseh brought an action against Mackay in the High Court at Singapore claiming $48,000 remuneration for finding a purchaser for certain property. The action was dismissed with costs which were taxed at $6,742.95.

The trial Judge refused a stay of execution as to the costs.

On 10th June, 1938 Manasseh filed his notice of appeal. The costs not having been paid, Mackay issued execution in Penang where Manasseh lived. The execution was levied at some date subsequent to 23rd June and realised $116.

On the 18th July Mackay, the judgment creditor filed a petition in bankruptcy against Manasseh based on the issue of the execution.

On the hearing of the petition in Penang, the bankrupt applied for a stay pending the hearing of the appeal. The learned Judge in Penang held that he had no discretion to grant a stay and on 12th August he made receiving and adjudication orders against Manasseh.

This appeal is against the refusal to stay the the bankruptcy proceedings.

Counsel for the respondent admitted before us (and in our opinion rightly admitted) that s. 95 of the Bankruptcy Ordinance gave the Judge power to stay proceedings subject to such terms and conditions as he thinks just, and both counsel for the appellant and for the respondent asked this Court not to remit the case but to exercise the discretion which the Judge in Penang sitting in bankruptcy might have exercised.

Now the position is this, Mackay has been a successful defendant and is a judgment creditor against Manasseh for $6,724.95, costs which Mackay was forced to incur by reason of Manasseh's unsuccessful action. These costs have not been paid and it looks as though Manasseh was unable to pay. He wishes to appeal and thus cause Mackay further costs which, if he succeeds in the appeal he may be unable to recover from the appellant Manasseh.

On the other hand, the appellant should not be absolutely deprived of his right of appeal. It was suggested that the Official Assignee could appeal. It is usual for the Official Assignee to require security for costs to be given by persons interested in the appeal succeeding. There is no evidence before us as to what other creditors there would be in the bankruptcy of Manasseh. It is not likely any creditor would give security if the amount he stood to lose was greatly in excess of the amount he stood to gain in the event of the appeal succeeding. Success in the appeal would probably result in there being no act of bankruptcy on which the petition could be based.

Section 95 of the Bankruptcy Ordinance empowers the Court, for sufficient reason to stay proceedings under a bankruptcy petition on such terms and conditions as the Court thinks just.

A question therefore arises, is there sufficient reason? If this question is answered in the affirmative, a second question arises—should terms and conditions be imposed and if so, what should those terms and conditions be?

In *In re Yeatman*, 16 Ch. D. 283 the act of bankruptcy was non-payment of a taxed bill of costs.

Cotton, L.J. said at p. 289.

> "But a judgment had been obtained establishing the validity of the petitioning creditors' debt, and, in my opinion, when that is so, and the judgment has not been reversed, the Registrar has power to proceed with the hearing of the petition, if in the exercise of his judicial discretion he thinks fit to do so. But if he is satisfied that a real appeal from the judgment is pending, he ought, in my opinion, as was done in the present case, to adjourn the hearing of the petition until after the the appeal shall have been disposed of."

No question of terms or conditions arose in that case. The remark of Cotton L.J. related to antecedent proceedings. What the Court of Appeal had before it was an appeal against an adjudication and it ordered the appeal to stand over pending the trial of an action which might result in a fund being forthcoming which would be available to pay the debt claimed by the petitioning creditor.

Ex parte Heyworth. In re Rhodes, 14 Q.B.D. 49 is more in point.

The Court of Appeal decided that the pending of a *bona-fide* appeal by the debtor against the judgment which gave arise to the debt fully justified the Registrar in adjourning the petition generally with liberty to apply.

The Registrar's Order was made under s. 7, sub-s. 4 of the Act of 1883, which is identical with s. 6, sub-s 4 of the Bankruptcy Ordinance (Cap. 45), a section which makes no reference to terms or conditions and this point of terms and conditions was not touched on in *In re Rhodes*.

In *re Flatau*, 22 Q.B.D. 83 the Registrar refused to stay proceedings under the same subsection though an appeal was pending.

In *re French*, 6 Morr. 258 is to the same effect.

In *In re Evans*, 50 L.T.R. 158 the Registrar refused a stay unless security was given although a cross action by the debtor against the creditor was pending. The appeal was dismissed. One of the grounds of appeal was that security alleged to be in excess of the debt claimed was ordered. Cotton L.J. said—

> "It is quite true that the general rule is that security should be given only for an amount equal to that of the particular debt in question."

This case was under s. 9 of the Act of 1869 corresponding to s. 6, sub-s. 5 of the Colony Ordinance which relates to a debtor denying the debt. Here the debt cannot be denied, the judgment is admitted.

In *In re Russell. Ex parte Temperton*, 10 T.L.R. 165 the creditor Temperton had obtained a judgment for £250 damages. An appeal to the Court of Appeal was dismissed. A bankruptcy notice founded on judgment debt for costs was served upon Russell and a bankruptcy petition was presented against him. Russell entered an appeal to the House of Lords on 1st August and on the 4th he lodged £200, the amount of the deposit necessary to be lodged on entering an appeal to the House of Lords. On August 5th the Registrar granted an unconditional stay of the proceedings and the bankruptcy petition pending the appeal to the House of Lords. An appeal by the creditor was dismissed by a Divisional Court but in the Court of Appeal Lord Halsbury said:

> "but if proceedings were to be stayed, it ought to be upon terms that would not inflict upon the creditor. Those terms must be that the debtor should pay the costs already incurred. Large costs had been already incurred, and now the debtor proposed taking more steps that would cause more costs."

This case is mentioned in *Baldwin* on Bankruptcy but we have failed to find a reference to it in *Halsbury, Mews'* Digest, or *Williams* 15th ed. The latter omission is the more remarkable as the case throws some light on doubts expressed in the notes to s. 113 of the English Act.

The action out of which the petition arose lasted, we were told, seven days. The judgment was a lengthy one. It was read to us by Mr. Balfour Ross, but we have seen neither the pleading nor the evidence. We can express no opinion upon the merits of the case or upon the prospects of the appeal, but we cannot say that the appeal is frivolous.

We think that security should be given of such amount that if the defendant (respondent) succeeds in the appeal, his position will be neither better nor worse than it is now. This result will be obtained if Manasseh deposits in Court security for the costs of the appeal. If the appeal succeeds, this deposit will be paid back to Manasseh; if it fails, Mackay will be indemnified against his costs of the appeal and will be left to attempt to recover the $6,724.95 for which he has at present a judgment.

It is difficult to estimate what Mackay's costs will be, but having regard to the magnitude of the case they will probably be considerable. We think $3,500 an approximate figure and our order will be that the proceedings in the bankruptcy are stayed until 31st October, 1938 and if Manasseh increases such security for the costs of the appeal as he may have already given to

the sum of $3,500 on or before 31st October, 1938, the receiving and adjudication orders will be set aside and the proceedings upon the bankruptcy petition will be stayed pending the decision of the appeal.

Each side set up too absolute a case before the Judge below. The issue appears to have been discretion or no discretion. The question of terms or conditions on which the proceedings might be stayed appears from the papers before us not to have been raised.

Each side has had some measure of success in this appeal. There will be no order as to costs.

Order accordingly.

Solicitors for appellant:—
John G. Campbell & Co.

Solicitors for respondent:—
Johannes & Sammy.

[COURT OF CRIMINAL APPEAL]
McELWAINE, C.J., MILLS & PEDLOW, JJ.
August 29, 1938.

REX v. ONG CHOON.

[SINGAPORE CRIMINAL APPEAL No. 25 of 1938]

The Penal Code (Cap. 20), s. 300—Culpable homicide not amounting to murder—S. 80—Accident in the doing of a lawful act—Question not clearly left to the jury by trial Judge.

A defence however weak and whether raised in evidence or even in a statement from the dock or by way of explanation must be left to the jury. Any point on which there is evidence which may afford a defence should be drawn to the attention of the jury, even if the defence has not raised it and even if it is inconsistent with the defence.

CRIMINAL APPEAL.

Taylour for appellant.

Butterfield, Crown Counsel, for the Crown.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

The judgment of the Court of Criminal Appeal (**McELWAINE, C.J., MILLS & PEDLOW, JJ.**) was delivered by—

McELWAINE, C.J.—The appellant was charged with the murder of one Lim Sua Kow and on his trial was convicted of culpable homicide not amounting to murder and was sentenced to six years rigorous imprisonment.

He appealed with the leave of a Judge against his conviction and the only ground of appeal argued before this Court was that the accused at his trial raised as a defence that Lim Sua Kow had met with his death by accident and that this defence was not put, or was inadequately put, to the jury.

A defence, however weak and whether raised in evidence or even in a statement from the dock or by way of explanation must be left to the jury, *Dinnick*, 3 Cr. App. Rep. 77. *Richards*, 4 Cr. App. Rep. 161. *Hill*, 7 Cr. App. Rep. 26. Any point on which there is evidence which may afford a defence should be drawn to the attention of the jury, even if the defence has not raised it *Rex* v. *Hooper*, (1915) 2 K.B. 431; 11 Cr. App. Rep. 136 and even if it is inconsistent with the defence *Rex* v. *Thorpe*, 41 T.L.R. 468; 18 Cr. App. Rep. 189. The judge has great freedom in pointing out to the jury the value of the evidence or the improbability of the defence provided he puts the defence fairly to the jury. Further, if there is no evidence which might reduce a charge of murder to a lesser offence the judge should not leave the question of the lesser offence to the jury. *Rex* v. *Phillips*, 32 T.L.R. 414, *Rex* v. *Thorpe* (*supra*). The principal evidence in the Crown case was a dying deposition made by the deceased to a magistrate in which he said he was asleep in bed when he awoke feeling the accused kneeling upon him and cutting his throat and that in defending himself he got cut in the arms and chest. Medical evidence was given of the wounds on deceased. Besides the severe cut on the throat which was the cause of death, there was an incised wound severing the abdominal muscle, and incised wounds on the palm of the left hand, and on the left forearm besides minor abrasions. The doctor thought the wounds consistent with the deceased's story.

The accused made a statement to a magistrate in which he gave a different version of the tragedy. He said there was a dispute with the deceased about a debt he owed the deceased, that the deceased seized a chopper and struck him on the hand between the thumb and forefinger. The accused had in fact such a wound on his right hand. The accused said in his statement to the magistrate that in the course of the struggle the chopper accidentally cut the deceased's neck.

The accused gave evidence on oath in which he told a somewhat different story but adhered to his main defence of which he gave greater detail.

"When I was holding his hand in which he had a knife he attempted to snatch the knife with the other hand. By so doing he hurt himself in the palm. There was a struggle for possession of the knife. We were pushing about. He attempted to push the knife towards my chest. I attempted to push it back to him. I then told him to throw away the knife. He refused, and he said he wanted to take my life. I repeated the words requesting him to throw away the knife as there was no enmity between